



# UC DAVIS LAW REVIEW

UNIVERSITY OF CALIFORNIA, DAVIS, SCHOOL OF LAW • VOL. 40, No. 1, Nov. 2006

## 2006 EDWARD L. BARRETT, JR., LECTURE

### The Assault on the Constitution: Executive Power and the War on Terrorism

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*The Bush administration has made unprecedented claims of unchecked executive power. The Constitution reflects a simple model that two branches of government should have to be involved in virtually all major government actions. The Bush administration, however, has claimed the ability to detain individuals, to engage in electronic eavesdropping, and to authorize torture even in violation of federal statutes. The solution must be for courts to reject these broad claims of presidential authority.*

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## INTRODUCTION

Over thirty years ago, during the Nixon presidency, noted historian Arthur M. Schlesinger, Jr., wrote *The Imperial Presidency*.<sup>1</sup> Nothing Schlesinger described begins to approach what has occurred during the presidency of George W. Bush. The Bush administration has claimed the authority to detain American citizens indefinitely as enemy combatants without warrants, grand jury indictments, or trial by jury and proof beyond a reasonable doubt.<sup>2</sup> The administration has asserted the power to ignore statutes and treaties prohibiting torture.<sup>3</sup> It has maintained that the administration can engage in warrantless electronic eavesdropping in violation of the Fourth Amendment and federal statutes.<sup>4</sup> The Bush administration has argued that it can detain foreign citizens indefinitely at Guantanamo Bay, Cuba, without judicial review.<sup>5</sup>

Together, these actions are an assault on the Constitution. The Bush administration's positions on these and other issues share several characteristics. First, they all aggrandize executive power. In fact, the Bush administration's approach to executive power can be traced back to Republican presidencies over the last forty years. The Nixon administration's efforts to increase presidential powers were intensified during the Reagan and first Bush presidencies and have come to fruition under President George W. Bush. Second, the Bush administration rejects the ability of the courts to review its actions and even of Congress to check its conduct. Its actions and positions cannot be reconciled with a system based on checks and balances. Third, the Bush administration's approach to presidential power is at

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<sup>1</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). Primarily concerned with "presidential usurpation" of war-making powers, Schlesinger discusses "the appropriation by the Presidency, and particularly by the [Nixon] Presidency, of powers reserved by the Constitution and by long historical practice to Congress." *Id.* at viii-ix.

<sup>2</sup> See, e.g., Brief of the United States at 30, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (discussing military's settled authority to detain enemy combatants).

<sup>3</sup> See Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice, to Alberto R. Gonzales, Counsel to the President 39-46 (Aug. 1, 2002) [hereinafter *Torture Memo*], available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_20020801\\_JD\\_%20Gonz\\_.pdf#search=%22jay%20bybee%22](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf#search=%22jay%20bybee%22).

<sup>4</sup> See JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* 39-60 (2005).

<sup>5</sup> See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (addressing argument in favor of indefinite detention); Brief of the United States, *supra* note 2, at 42-43.

odds with the traditional, conservative approach to interpreting the Constitution. For decades, conservatives have argued that the meaning of the Constitution should be determined by looking to its text and the framers' intent.<sup>6</sup> But if anything is clear about the framers, it is that they deeply distrusted executive power. Unchecked executive authority cannot be reconciled with the text of the Constitution, and the framers accepted significant executive power only as a necessary evil.

This essay discusses why the Bush administration's approach to presidential power is an assault on the Constitution. Part I suggests a framework for analyzing claims of presidential power. Part II describes some of the claims of executive power made by the Bush administration. Part III explains why this administration's approach to executive power is unprecedented and antithetical to basic constitutional principles.

#### I. A FRAMEWORK FOR ANALYZING EXECUTIVE POWER

The Constitution is based on a simple vision of shared and separated powers. For almost every major government action, at least two branches of government should have to be involved. Enacting a law requires involvement of both Congress and the President. Enforcing a law requires a prosecution by the executive and a conviction by the courts: searching or arresting someone requires approval by the courts and execution by the executive; filling key government positions — federal judges, ambassadors, cabinet secretaries — requires appointment by the President and confirmation by the Senate; undertaking treaty obligations requires negotiation by the President and ratification by the Senate; and going to war requires a declaration by Congress and implementation by the President as Commander in Chief.<sup>7</sup>

To be sure, there are some areas where the Constitution assigns power to only one branch, unchecked by any other. For example, the President alone has the pardon power and there is no oversight of pardons by any other branch of government.<sup>8</sup> Congress may impeach

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<sup>6</sup> See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (describing and defending originalist approach to constitutional interpretation).

<sup>7</sup> See generally CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* (2d ed. 2002) (discussing interaction of three branches of government).

<sup>8</sup> See U.S. CONST. art. II, § 2, cl. 1; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141 (1871) (discussing President's power of pardon is not subject to legislation, and Congress cannot limit effect of pardon).

and remove the President, the Vice President, federal judges, and other officers of the United States.<sup>9</sup> Impeachment and removal decisions are not reviewable by any other branch of government.<sup>10</sup> Congress's choice to propose a constitutional amendment is not reviewable by the courts or the executive branch.<sup>11</sup> However, even these areas of seemingly unilateral executive authority must be understood as part of an overall system of checks and balances. For example, the President's pardon power is a final check to make sure that no one is incarcerated in violation of the Constitution and laws of the United States, and impeachment acts as a check on abuses by the other branches of government. Impeachment has the added protection of requiring a two-thirds vote of the Senate to remove a person from office. Constitutional amendments must be approved by three-fourths of the states.

The Constitution thus embraces an approach to government power that is both simplistic and elegant. Traditional discussions of presidential power have recognized this basic constitutional framework. For example, the Supreme Court often invokes Justice Robert Jackson's famous description of presidential power in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>12</sup> Justice Jackson's concurring opinion is perhaps the most famous opinion dealing with presidential power because he delineated three zones of presidential authority.<sup>13</sup> First, Jackson said that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all

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<sup>9</sup> U.S. CONST. art. I, § 2, cl. 5 (providing House of Representatives has sole power to impeach); U.S. CONST. art. I, § 3, cl. 6 (stating Senate has sole power to try impeachments). See also U.S. CONST. art. II, § 4 (stating, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors").

<sup>10</sup> See *Nixon v. United States*, 506 U.S. 224, 235 (1993) (stating that challenges to process of impeachment are non-justiciable political questions).

<sup>11</sup> See CHEMERINSKY, *supra* note 7, at 144 (discussing Supreme Court decisions indicating that "process of ratifying amendments poses a nonjusticiable political question").

<sup>12</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (declaring unconstitutional President Truman's seizure of steel mills). For a recent invocation of this framework, see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006).

<sup>13</sup> *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (declaring that "[t]he proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in [*Youngstown*]").

that Congress can delegate.”<sup>14</sup> Under such circumstances, the President’s acts are presumptively valid.

Jackson’s second zone covers circumstances “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>15</sup> Jackson said that it is impossible to formulate general rules as to the constitutionality of actions in this area; rather, constitutionality is likely “to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>16</sup>

Third, Jackson argued that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”<sup>17</sup> Only if the law enacted by Congress is unconstitutional will such presidential action disobeying federal law be allowed. In other words, for Justice Jackson, presidential power is at its weakest if the President is violating a statute and at its strongest when in compliance with a statute. This formulation is consistent with a system that values shared powers and checks and balances.

Another way of looking at executive power focuses on the middle category of Justice Jackson’s analysis: the “twilight zone” where there is neither constitutional nor statutory authority for executive action. Here, four different approaches apply.<sup>18</sup> Three of the four approaches stress checks and balances: (1) there is no inherent presidential power (the president may act only if there is express constitutional or statutory authority); (2) the President has inherent authority unless the President interferes with the functioning of another branch of government or usurps the powers of another branch; (3) the President may exercise powers not mentioned in the Constitution so long as the President does not violate a statute or the Constitution; (4) the President has inherent powers that may not be restricted by Congress and may act unless the Constitution is violated. Although some authority can be found for each of these approaches, only the fourth would accord the President unchecked authority. As described below, the Bush administration embraces this approach and asserts that the

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<sup>14</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>15</sup> *Id.* at 637.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See generally Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863 (1983) (suggesting these approaches over twenty years ago).

approach includes the ability to act without judicial review of executive actions. As explained below, no Supreme Court case in American history has ever approved presidential actions that violate the Constitution, statutes, or treaties based on inherent executive powers. Yet this is exactly what the Bush administration claims to have the power to do.

## II. THE BUSH ADMINISTRATION AND EXECUTIVE POWER

It is tempting to see the Bush administration's approach to executive power as a response to the tragedy of September 11, 2001. The administration claims that its actions are necessary to respond to the unprecedented threat to the nation's security. However, the roots of its assertion of power lie in the Nixon and Reagan presidencies.

The Nixon administration repeatedly asserted broad, uncheckable power. For example, the administration claimed the power to impound federal funds allocated and appropriated by Congress.<sup>19</sup> This led Congress to adopt the Impoundment Control Act of 1974, which effectively forbids the practice.<sup>20</sup> The Nixon administration also asserted the authority to engage in warrantless wiretapping for the sake of domestic security. In 1972, the Supreme Court unanimously ruled that the President could not authorize such warrantless electronic surveillance.<sup>21</sup>

The claim of expansive, uncheckable presidential power grew during the Reagan presidency, most notably during the major scandal of the Reagan administration: Iran-Contra. Several high-level members of the Reagan administration intentionally violated the Boland Amendment by raising funds from third parties and selling arms to Iran to fund the Contras, an anti-communist guerilla organization in Nicaragua.<sup>22</sup> Some have defended these actions on the

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<sup>19</sup> See, e.g., *State Highway Comm'n of Mo. v. Volpe*, 347 F. Supp. 950, 953 (W.D. Mo. 1972), *aff'd*, 479 F.2d 1099 (8th Cir. 1973) (finding withholding highway funds from Missouri impermissible under Federal-Aid Highway Act of 1956); *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60, 80 (D.D.C. 1973) (finding impoundment unconstitutional); cf. *Train v. New York*, 420 U.S. 35, 43-44 (1975) (rejecting argument that Federal Water Pollution Control Act authorized impoundment of federal funds).

<sup>20</sup> 31 U.S.C. § 1301 (2006).

<sup>21</sup> *United States v. U.S. Dist. Court*, 407 U.S. 297, 324 (1972) (requiring judicial approval for surveillance).

<sup>22</sup> See MICHAEL E. LEDEEN, *PERILOUS STATECRAFT: AN INSIDER'S ACCOUNT OF THE IRAN-CONTRA AFFAIR* 245 (1988); LAWRENCE E. WALSH, *I FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS* 1-24 (1993). The Boland Amendment, an amendment to an appropriation bill, barred any "agency or entity of

ground that the Boland Amendment was an impermissible restriction on the President's power to conduct foreign policy. For example, a Republican minority report to the House Committee Investigating the Iran-Contra Affair declared: "[The] Constitution gives the President some power to act on his own in foreign affairs . . . Congress may not use its control over appropriations, including salaries, to prevent the executive or judiciary from fulfilling Constitutionally mandated obligations."<sup>23</sup> The Bush administration takes the same position as the Nixon and Reagan administrations to justify many of its actions taken in war on terrorism. Three examples illustrate its broad assertion of unchecked powers: detentions, eavesdropping, and torture.

#### A. Detentions

One of the most disturbing acts of the Bush administration has been its claim of authority to suspend the Bill of Rights by detaining Jose Padilla, an American citizen apprehended in the United States, without complying with the Fourth, Fifth, and Sixth Amendments. Padilla was apprehended at Chicago's O'Hare Airport in May 2002 and accused of planning to build and detonate a "dirty bomb" in the United States.<sup>24</sup> Authorities imprisoned Padilla for almost four years before indicting him for any crime.<sup>25</sup> The government continues to hold him on criminal charges.<sup>26</sup>

After his arrest, officials took Padilla to New York.<sup>27</sup> An attorney filed a petition in the Southern District of New York to meet with him; authorities then transferred Padilla to a military prison in South Carolina.<sup>28</sup> But the litigation over his detention and rights remained in the Second Circuit.<sup>29</sup> The Second Circuit ruled in Padilla's favor and held that the government did not have the authority to hold him as an

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the United States involved in intelligence activities" from spending funds "to support military or paramilitary operations in Nicaragua." Pub. L. No. 98-215, 97 Stat. 1473 (1983).

<sup>23</sup> REPORT OF THE CONG. COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433 and S. REP. NO. 100-216, 473 (1987) (minority report).

<sup>24</sup> Padilla v. Rumsfeld, 352 F.3d 695, 699, 703 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

<sup>25</sup> Padilla v. Hanft, 126 S. Ct. 1649, 1649-50 (2006) (noting that authorities apprehended Padilla in May 2002 and indicted him after he filed writ of certiorari in September 2005).

<sup>26</sup> *Id.* at 1650.

<sup>27</sup> *Id.* at 1649.

<sup>28</sup> Rumsfeld v. Padilla, 542 U.S. 426, 432 (2004).

<sup>29</sup> Padilla v. Rumsfeld, 352 F.3d at 710.



enemy combatant.<sup>30</sup> The Supreme Court, in a 5-4 decision, concluded that the Second Circuit lacked jurisdiction to hear Padilla's habeas corpus petition.<sup>31</sup> The Court said that a person must bring a habeas petition where he or she is being detained against the person immediately responsible for the detention.<sup>32</sup> Padilla needed to file his habeas petition in South Carolina against the head of the military prison there.<sup>33</sup>

Justice Stevens wrote for the four dissenters and lamented that Padilla, who had already been held for over two years, had to begin the process all over again.<sup>34</sup> But there seems no doubt that five Justices on the Supreme Court voted that it was illegal to detain Padilla as an enemy combatant. In a footnote in his dissenting opinion, Justice Stevens expressly stated that he agreed with the Second Circuit that there was no legal authority to detain Padilla as an enemy combatant.<sup>35</sup> Nonetheless, the Fourth Circuit, considering Padilla's subsequent habeas petition, ruled that Padilla could be held as an enemy combatant.<sup>36</sup> In an opinion by Judge Michael Luttig, the court held that the President possessed authority to detain Padilla as an enemy combatant, pursuant to an act of Congress passed after September 11, the Authorization for Use of Military Force ("AUMF").<sup>37</sup> As Padilla's case headed back to the Supreme Court, the government formally indicted him and the Supreme Court ultimately denied certiorari.<sup>38</sup> Thus, the Supreme Court never ruled on the government's authority to detain an American citizen as an enemy combatant.

But Padilla's case is not the only instance where the Bush administration claimed the power to detain people without judicial

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<sup>30</sup> *Id.* at 724.

<sup>31</sup> *Rumsfeld v. Padilla*, 542 U.S. at 442.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 451.

<sup>34</sup> *Id.* at 455-65 (Stevens, J., dissenting).

<sup>35</sup> *Id.* at 464 n.8. *See also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (emphatically arguing that American citizen cannot be held without trial as enemy combatant unless Congress suspends writ of habeas corpus).

<sup>36</sup> *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006).

<sup>37</sup> *Id.*; *see* Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>38</sup> *Padilla v. Hanft*, 126 S. Ct. 1649, 1649-50 (2006) (denying cert.). Surely the government indicted Padilla before it reached the Supreme Court, because it counted to five and knew based on the earlier ruling that it would lose in the high court. Indeed, the Fourth Circuit strongly objected to the government's actions. *Padilla v. Hanft*, 432 F.3d at 587.

review. Yaser Hamdi is an American citizen apprehended in Afghanistan and brought to Guantanamo Bay.<sup>39</sup> There, authorities discovered that Hamdi was an American citizen then took him to a military prison in South Carolina.<sup>40</sup> The government held Hamdi as an enemy combatant and never charged him with any crime.<sup>41</sup>

In *Hamdi v. Rumsfeld*, the Supreme Court ruled 5-4 that the government may hold an American citizen apprehended in a foreign country as an enemy combatant.<sup>42</sup> The plurality concluded that Hamdi's detention was authorized pursuant to the AUMF.<sup>43</sup> Writing for the plurality, Justice O'Connor stated that the AUMF constituted sufficient congressional authorization to meet the requirements of the Non-Detention Act and permit detaining an American citizen apprehended in a foreign country as an enemy combatant.<sup>44</sup> Justice Thomas was the fifth vote for the government on this issue, and in a separate opinion he concluded that the President has inherent authority, pursuant to Article II of the Constitution, to hold Hamdi as an enemy combatant.<sup>45</sup>

As to whether Hamdi must be accorded due process, the Court ruled 8-1 in favor of due process, with only Justice Thomas dissenting.<sup>46</sup> Writing for the majority, Justice O'Connor explained that Hamdi was entitled to have his habeas petition heard in federal court and that imprisoning a person is the most basic form of deprivation of liberty.<sup>47</sup> Thus, the government must provide American citizens detained as enemy combatants on foreign soil with due process, and it must apply the three-part balancing test under *Mathews v. Eldridge* to determine due process procedures.<sup>48</sup> The *Mathews* balancing test instructs courts to weigh the importance of the interest to the individual, the ability of

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<sup>39</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Hamdi's situation is identical to that of John Walker Lindh, except that Lindh was indicted and plead guilty to crimes. See generally *United States v. Lindh*, 212 F. Supp. 2d 541 (D. Va. 2002) (describing procedural and factual background of Lindh's case).

<sup>42</sup> *Hamdi*, 542 U.S. at 516-17.

<sup>43</sup> *Id.* at 518.

<sup>44</sup> *Id.* at 540-42. The Non-Detention Act establishes that no American citizen shall be detained by the government except pursuant to an Act of Congress. 18 U.S.C. § 4001 (2006). The Act also states that except for military and naval institutions, the Attorney General controls the federal penal system. *Id.*

<sup>45</sup> *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).

<sup>46</sup> *Id.* at 533-35 (majority opinion); *Id.* at 594-99 (Thomas, J., dissenting).

<sup>47</sup> *Id.* at 509, 529-30 (majority opinion).

<sup>48</sup> 424 U.S. 319, 334-35 (1976).

additional procedures to reduce the risk of an erroneous deprivation, and the government's interests.<sup>49</sup>

Although the *Hamdi* Court did not specify the procedures that the government must follow in Hamdi's case, the Justices' opinions were explicit that Hamdi must be given a meaningful, factual hearing.<sup>50</sup> At a minimum, this hearing must include notice of the charges, the right to respond, and the right to be represented by an attorney.<sup>51</sup> The Court, however, suggested that hearsay evidence might be admissible and the burden of proof might fall on Hamdi.<sup>52</sup> Only Justice Thomas rejected this conclusion and accepted the government's argument that the President could detain enemy combatants without any form of due process.<sup>53</sup>

Numerically, the most significant presidential claim of authority to detain without judicial review involves the detention of over 600 individuals in Guantanamo Bay. Since January 2002, the United States government has held over 600 people as prisoners at a military facility in Guantanamo. The Bush administration has argued that there can be no judicial review of its actions with respect to aliens detained abroad.<sup>54</sup> Initially, the administration argued that federal courts lacked jurisdiction to hear a writ of habeas corpus brought on behalf of the Guantanamo prisoners.<sup>55</sup> But two habeas corpus petitions filed on behalf of Guantanamo detainees reached the Supreme Court.<sup>56</sup> The families of twelve individuals being held at Camp X-Ray in Guantanamo filed *Al Odah v. United States*,<sup>57</sup> and relatives of Australian and British detainees filed *Rasul v. Bush*,<sup>58</sup> the title under which the Supreme Court decided both cases.<sup>59</sup> The government moved to dismiss both cases, contending that the federal courts lacked authority to hear habeas corpus petitions by those being held in Guantanamo.<sup>60</sup> In March 2003 the United States Court of Appeals for the District of

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<sup>49</sup> *Id.* at 334-35.

<sup>50</sup> *Hamdi*, 542 U.S. at 533.

<sup>51</sup> *Id.* at 533, 539.

<sup>52</sup> *Id.* at 533-34.

<sup>53</sup> *Id.* at 592 (Thomas, J., dissenting).

<sup>54</sup> Brief of Respondent at 14, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

<sup>55</sup> *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

<sup>56</sup> *Id.* at 471.

<sup>57</sup> 321 F.3d 1134, 1136 (D.C. Cir. 2003).

<sup>58</sup> 215 F. Supp. 2d 55, 61 (D.D.C. 2002).

<sup>59</sup> See *Rasul*, 542 U.S. at 470-75 (describing procedural background of *Al Odah* and *Rasul* cases and how both present same question).

<sup>60</sup> *Rasul*, 215 F. Supp. 2d at 61.

Columbia Circuit affirmed the dismissal for lack of jurisdiction and ruled that no court in the country could hear the petitions brought by the Guantanamo detainees.<sup>61</sup>

The Supreme Court reversed the D.C. Circuit and held, 6-3, that those held in Guantanamo do have access to the federal courts via a writ of habeas corpus.<sup>62</sup> But the *Rasul* Court did not address what type of hearing ultimately must be accorded to those in Guantanamo.<sup>63</sup> Rather, the case was limited to the issue of whether a federal court could hear their habeas corpus petition.<sup>64</sup> On remand, the government moved to dismiss the detainees' claims for failing to state a claim upon which relief could be granted.<sup>65</sup> Eleven of the thirteen cases were consolidated before District Judge Joyce Hens Green, who ruled against the government and held that the detainees successfully stated a cause of action.<sup>66</sup> But Judge Richard Leon kept the two remaining Guantanamo cases that had been assigned to him and granted the government's motion to dismiss.<sup>67</sup> In the meantime, the detainees remain in prison in Guantanamo, some now for over four years. In sum, except perhaps for President Lincoln's actions during the Civil War, there is no precedent for the assertion of authority to detain individuals without due process that has occurred since September 11.

### B. Electronic Eavesdropping

In December 2005 the *New York Times* revealed that the National Security Agency was intercepting electronic communications by telephone and e-mail between the United States and foreign countries without warrants or probable cause.<sup>68</sup> The Bush administration acknowledged and vehemently defended this warrantless wiretapping.<sup>69</sup> Indeed, on several occasions, Attorney General Alberto

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<sup>61</sup> *Al Odah*, 321 F.3d at 1141-42.

<sup>62</sup> *Rasul*, 542 U.S. at 483-84.

<sup>63</sup> *See id.* (stating that Court need not now determine "whether and what further proceedings may become necessary").

<sup>64</sup> *Id.* at 470.

<sup>65</sup> *Rasul*, 215 F. Supp. 2d at 57-59 (describing procedural history and government's motion to dismiss).

<sup>66</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475-76 (D.D.C. 2005).

<sup>67</sup> *Id.* at 452 n.14; *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005).

<sup>68</sup> *See James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (based on JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION (2005)).

<sup>69</sup> *See, e.g., Eric Lichtblau, Bush Defends Spy Program and Denies Misleading Public*, N.Y. TIMES, Jan. 2, 2006, at A11 ("[President] Bush's strong defense of the [National

Gonzales has said that there may be other warrantless eavesdropping beyond what has been disclosed and reported in the media.<sup>70</sup> However, the Fourth Amendment dictates that searches require a judicially approved warrant.<sup>71</sup> Federal statutes explicitly state that the government may engage in electronic eavesdropping only after obtaining a warrant either from a federal district court or from the Foreign Intelligence Surveillance Court ("FISC").<sup>72</sup> The President has claimed two sources of power for engaging in warrantless surveillance: his power as Commander in Chief and his authority under the AUMF joint resolution after September 11.<sup>73</sup> Neither source provides for such authority.

The President, as Commander in Chief, has no power to violate the Bill of Rights. Indeed, if the President can authorize wiretapping without a warrant, he could authorize searches of homes without complying with the Fourth Amendment. Under this reasoning, the President could suspend freedom of speech or the press as Commander in Chief. If presidential power can trump the Fourth Amendment's requirement for a warrant, there is no reason why it cannot be used to override any other constitutional provision. Nor does the AUMF provide a basis for such presidential power. Congress authorized the use of troops and arms to respond to the terrorists; the resolution has nothing to do with eavesdropping.<sup>74</sup>

Authorizing "military force" does not include every other action that the government wants to take in the name of the war on terrorism. The Supreme Court made this clear in its recent decision in *Hamdan v. Rumsfeld*.<sup>75</sup> The issue in *Hamdan* was the legality of the military commissions created by the President by executive order to try those being held in Guantanamo.<sup>76</sup> The Supreme Court held that there was

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Security Agency] program, which he authorized in 2002 to allow some domestic eavesdropping without court warrants, came as a leading Democratic lawmaker called on the administration to make available current and former high-level officials to explain the evolution of the secret program.").

<sup>70</sup> See generally DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006) (discussing basis for authorizing NSA's interception of international communications linked to Al Qaeda), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

<sup>71</sup> U.S. CONST. amend. IV.

<sup>72</sup> 18 U.S.C. § 2511(2)(f) (2006).

<sup>73</sup> See DEP'T OF JUSTICE, *supra* note 70, at 1-3.

<sup>74</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>75</sup> 126 S. Ct. 2749, 2749, 2774-75 (2006).

<sup>76</sup> *Id.* at 2762.

not adequate statutory authority for the military commissions created by presidential executive order.<sup>77</sup> The Court expressly stated that it did not need to consider whether the President may constitutionally convene military commissions “without the sanction of Congress.”<sup>78</sup> The Court said that it “has not answered [the question] definitively, and need not answer today.”<sup>79</sup> In an important footnote, the Court explained: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. . . . The Government does not argue otherwise.”<sup>80</sup>

During World War II, in *Ex parte Quirin*, the Supreme Court upheld the use of military tribunals for Nazi saboteurs.<sup>81</sup> In *Hamdan*, writing for the majority, Justice Stevens stated: “We have no occasion to revisit *Quirin*’s controversial characterization of Article of War 15 as congressional authorization for military commissions.”<sup>82</sup> The *Hamdan* Court stressed that two statutory provisions limited the President’s authority: Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”).<sup>83</sup> The Court explained that Article 21 conditioned the President’s use of military commissions on compliance with the “law of war,” which includes the four Geneva Conventions.<sup>84</sup>

The government claimed that there was statutory authority for the military commissions as provided for in the presidential executive order, especially under AUMF, adopted after September 11.<sup>85</sup> The government also argued that the Detainee Treatment Act authorized the military commissions.<sup>86</sup> The Supreme Court expressly rejected these arguments and declared, “[T]here is nothing in the text or legislative history of the AUMF even hinting that Congress intended to

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<sup>77</sup> *Id.* at 2759-60.

<sup>78</sup> *Id.* at 2774.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2774 n.23.

<sup>81</sup> 317 U.S. 1, 48 (1942).

<sup>82</sup> *Hamdan*, 126 S. Ct. at 2774.

<sup>83</sup> *Id.* at 2774, 2790-91 (quoting 10 U.S.C. § 836(b) and explaining that statute did not authorize sweeping presidential mandate and that government’s determination of practicability under this section was insufficient to justify military tribunals).

<sup>84</sup> *Id.* at 2779-80.

<sup>85</sup> *Id.* at 2774-75.

<sup>86</sup> *Id.*

expand or alter the authorization set forth in Article 21 of the UCMJ.”<sup>87</sup>

The *Hamdan* Court’s reasoning is important because the Bush administration has repeatedly pointed to the AUMF as authorizing its actions in the war on terrorism, including providing authority for warrantless electronic eavesdropping. Justice Stevens’s majority opinion makes it clear that the Supreme Court is unwilling to read the AUMF as a blank check for presidential actions, especially when they contradict statutory provisions. Warrantless electronic eavesdropping is particularly unnecessary because the government could have gone to the FISC and gained warrants. One study found that between 1978 and 1999, the FISC granted more than 11,883 warrants and had denied none.<sup>88</sup> The only argument that the administration has given for not doing so is that FISC warrants require a great deal of paperwork.<sup>89</sup> But administrative efficiency hardly justifies violating the Constitution and a federal statute.

### C. Torture

In 2002, the Department of Justice Office of Legal Counsel issued a memorandum that stated that the President could authorize torture of human beings in violation of treaties ratified by the United States and federal statutes that prohibit such conduct.<sup>90</sup> The so-called “Torture Memo” argued that the anti-torture statutes could not prohibit the President from ordering the use of torture in interrogations of enemy combatants because such a prohibition would violate the President’s constitutional powers.<sup>91</sup> The memo based this conclusion on a broad assertion of presidential war powers that recognized no ability of statutes or treaties to impose limits.<sup>92</sup>

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<sup>87</sup> *Id.* at 2775.

<sup>88</sup> Lawrence D. Sloan, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1496 (2001).

<sup>89</sup> See Press Briefing by Attorney General Alberto Gonzales & General Michael Hayden, Principal Dir. For Nat’l Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (stating that Bush administration continues to “go to FISA court and obtain orders,” but because FISA requires court order “[they] don’t have the speed and agility that [they] need, in all circumstances, to deal with this new kind of enemy”); see also DEP’T OF JUSTICE, *supra* note 70, at 5 (“FISA, by contrast, is better suited ‘for long-term monitoring’” (quoting Press Conference by President George W. Bush (Dec. 19, 2005))).

<sup>90</sup> Torture Memo, *supra* note 3, at 46.

<sup>91</sup> *Id.* at 39-46.

<sup>92</sup> *Id.* at 36-39.

As Professor Neil Kinkopf noted:

[The Torture Memo] failed even to cite to Justice Jackson's seminal opinion from *Youngstown*. This is no mere violation of citation etiquette, for it led OLC [Office of Legal Counsel] to fail to acknowledge that Congress has any relevant authority whatsoever. Had OLC employed Justice Jackson's framework, OLC would have been unable to avoid recognizing Congress's relevant powers, including the power to make rules to govern the military and to define and punish violations of the law of war. . . . There is no plausible interpretation that these powers are irrelevant to the validity of the prohibition on torture. . . .<sup>93</sup>

The Department of Justice ultimately withdrew the Torture Memo.<sup>94</sup> But as Kinkopf notes, "The withdrawing memo, however, does not repudiate or even question the substance of the Torture Memo's reasoning on the issue of presidential power."<sup>95</sup> The significance of the Torture Memo in terms of the Bush administration's views of executive power cannot be overstated. Top officials of the United States government were claiming that the government could torture human beings, notwithstanding laws and treaties specifically forbidding torture. This is an assertion of executive power that recognizes no limits and acknowledges no checks and balances.

### III. THE CONSTITUTION REJECTS UNCHECKED EXECUTIVE POWER

At the risk of stating the obvious, checking executive power was a central goal of the American Constitution. The framers of the Constitution feared executive power the most.<sup>96</sup> Indeed, in their view, endowing virtually all power in a single individual, such as King George III, threatened all liberty. Having endured the tyranny of the King of England, the framers viewed the principle of separation of

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<sup>93</sup> Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1171 (2006).

<sup>94</sup> See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, to James Corney, Deputy Attorney Gen. (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

<sup>95</sup> Kinkopf, *supra* note 93, at 1171.

<sup>96</sup> *Contra* JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 5, 24-29 (2005) (arguing to contrary and attempting to defend Bush administration's assertion of executive power based on originalism). But it is impossible to reconcile Professor Yoo's argument with framers who were deeply distrustful of executive power. See David Cole, *What Bush Wants to Hear: A Consideration of John Yoo's The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, N.Y. REV. BOOKS, Nov. 17, 2005, at ¶ 5.



powers as the central guarantee of a just government.<sup>97</sup> James Madison wrote that strict separation of powers was essential to preserve democracy in a republic because:

No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.<sup>98</sup>

Madison further warned:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.<sup>99</sup>

In the past, the Supreme Court has served an essential role in the system of separation of powers by checking executive power and rejecting presidential actions that usurp the powers of other branches of government or prevent them from carrying out their constitutional duties. In cases like *United States v. Nixon* and *Youngstown Sheet & Tube Co. v. Sawyer*, the Court imposed essential checks on executive power.<sup>100</sup>

The only Supreme Court case to support the Bush administration's claim of executive power is *United States v. Curtiss-Wright Export Corp.*<sup>101</sup> Due to concern that United States munitions manufacturers were arming both sides of a war in South America, Congress adopted a law that empowered the President to issue a proclamation making

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<sup>97</sup> See *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991).

<sup>98</sup> THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

<sup>99</sup> THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

<sup>100</sup> See generally *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting President Nixon's effort to invoke executive privilege to keep Watergate tapes from being used as evidence in court); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting President Truman's effort to seize steel mills during Korean War).

<sup>101</sup> 299 U.S. 304, 319-20 (1936).

illegal further sales of arms to the warring nations.<sup>102</sup> The case arose at a time when the Court was invalidating laws pertaining to domestic affairs as impermissible delegations of legislative power to the executive.<sup>103</sup> The Court, however, upheld the delegation to the President to stop munitions shipments and spoke generally of a fundamental difference between domestic and foreign policy.<sup>104</sup> Writing for the Court, Justice Sutherland declared:

The two classes of power are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.<sup>105</sup>

Moreover, Justice Sutherland maintained that the realities of conducting foreign policy require that the President possess much greater inherent powers than in the realm of domestic affairs.<sup>106</sup> The Court explained: "In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation."<sup>107</sup> For instance, the President has access to intelligence information that is generally unavailable to Congress.<sup>108</sup>

Although the Supreme Court still cites *Curtiss-Wright* as authority for broad inherent presidential power in the area of foreign policy, Justice Sutherland's reasoning has been thoroughly criticized.<sup>109</sup> First, some contend that his view is inconsistent with a written Constitution that contains provisions concerning foreign policy. If Justice Sutherland's view were correct, there would have been no reason for the Constitution to enumerate any powers in the area of foreign affairs; all powers would exist automatically as part of national

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<sup>102</sup> See *id.* at 311-13 (quoting both resolution empowering President and President Roosevelt's subsequent proclamation).

<sup>103</sup> See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (invalidating broad grant of code-making discretionary authority to executive).

<sup>104</sup> *Curtiss-Wright*, 299 U.S. at 315-16.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 318.

<sup>107</sup> *Id.* at 319.

<sup>108</sup> See *id.* at 320.

<sup>109</sup> See generally CHEMERINSKY, *supra* note 7, at 357-66 (discussing subsequent Supreme Court decisions citing *Curtiss-Wright* and detailing scholarly criticisms of Justice Sutherland's reasoning).

sovereignty. The enumeration of authority for conducting foreign policy rebuts the assumption that the President has complete control over foreign affairs simply by virtue of being chief executive.<sup>110</sup>

Second, many have criticized the historical account that is the foundation for Justice Sutherland's opinion. Professor Charles Lofgren notes that the "history on which [*Curtiss-Wright*] rest[s] is 'shockingly inaccurate'" and not based on either the text of the Constitution or the framers' intent.<sup>111</sup> In Lofgren's view, the framers intended that the presidency, like all branches of the federal government, have limited powers, not the expansive inherent authority described in *Curtiss-Wright*.<sup>112</sup>

Most importantly, all of the discussion of uncheckable executive power in *Curtiss-Wright* is just dicta.<sup>113</sup> Where the President asserted authority to violate a statute or treaty, the Court discussed uncheckable executive power in its holding.<sup>114</sup> In *Curtiss-Wright*, however, the President acted pursuant to express congressional authorization.<sup>115</sup>

The key flaw in the Bush administration's approach is that it ignores the basic framework that two branches of government should be involved in all major government actions. The Fourth, Fifth, and Sixth Amendments require arrests, and especially detentions, to be approved by the judiciary. The courts must approve searches, including electronic eavesdropping under the Fourth Amendment. In addition to these constitutional protections, treaties and statutes also regulate torture. Government treatment of individuals is not simply a matter of executive prerogative.

#### CONCLUSION

Throughout American history, the government's response to threats has been repression. The war on terrorism is now over four years old and shows no signs of abating. Authorities have imprisoned some individuals without due process for nearly that long and have given no indication about possible release. These detentions have lasted longer

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<sup>110</sup> David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493-94 (1946).

<sup>111</sup> Charles Lofgren, *United States v. Curtiss-Wright Export Corporation: A Historical Reassessment*, 83 YALE L.J. 1, 32 (1973).

<sup>112</sup> *Id.* at 30-32.

<sup>113</sup> See *Curtiss-Wright*, 299 U.S. at 319-20.

<sup>114</sup> See, e.g., cases cited *supra* note 100.

<sup>115</sup> *Curtiss-Wright*, 299 U.S. at 312-13.

than either World War I or World War II. In addition, the loss of freedom to average citizens has been enormous and, most disturbingly, there is no reason to believe that the country has been made any safer by the loss of liberty. There is no reason to believe that the government could not have fought terrorism just as effectively without ignoring the Constitution and the rule of law. The late Justice Louis Brandeis wrote:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>116</sup>

Justice Brandeis, of course, never knew John Ashcroft, Alberto Gonzales, or Donald Rumsfeld, but if he had, he could not have chosen a more apt description.

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<sup>116</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928).